Supreme Court, U.S.
FILED
SEP 26 1994
OFFICE OF THE CLERK

No. 94-183

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.
DEBTOR.

R. DAVID LEGG
PETITIONER,

VERSUS

W. STEVE SMITH, TRUSTEE,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. STEVE SMITH
COUNSEL OF RECORD
FOR RESPONDENT
910 LOUISIANA STE. 400
HOUSTON, TEXAS 77002
(713) 227-2525

SEPTEMBER 25, 1994

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QUESTIONS PRESENTED

In response to the questions presented by Petitioner, a number of "facts" included therein do not exist or are misstated. Rather than attempt to rephrase the questions, these misstatements will be pointed out in the following sections.

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IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.
Debtor.

R. DAVID LEGG
Petitioner,

versus

W. STEVE SMITH, Trustee,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

R. David Legg ("Legg") has been afforded every bit of due process, and then some, as he has appeared continually before the Bankruptcy Court since the commencement of the involuntary bankruptcy case of United Markets International, Inc. ("UMI") on February 7, 1985, and as he has appeared at the District Courts and the Fifth Circuit Court of Appeals on

numerous appeals and as he has earlier sought certiorari and stay in this Court. It is not, as Legg would have this Court believe, a conspiracy of W. Steve Smith, Trustee ("Trustee") who Legg unsuccessfully tried to remove, the judges who Legg unsuccessfully tried to recuse, and others; it is simply a question of when is enough.

An agreed Order for Relief was entered on March 28, 1985 in the UMI bankruptcy case. Legg subsequently appealed the Order for Relief at the District Court and Circuit Court level because Trustee was pursuing him in Adversary No. 85-0375 to recover over $300,000 of UMI funds taken by Legg on the eve of bankruptcy. Both Courts upheld that Order for Relief. Legg then began an attack on the Order for Relief under Fed.R.Civ.P. 60(b), but it was denied at the bankruptcy, district and appellate court levels, and the Supreme Court denied cert. (No. 92-810). The significance of the sanctity of the Order for Relief is that its invalidity was the sole basis for Legg's pleadings against Trustee and Essam Obaid ("Obaid"), Obaid & Almulla Construction Co., Ltd. ("OBALCO") and Obaid Technical Services Co., Ltd. ("OTS") in Civil Action No. H-92-2141 which was struck by the sanctions order. With the Order for Relief's validity, Legg has no standing, Legg has no claims and his pleadings failed.

The administration of this case has been a long ordeal. Its length has been caused by Legg. The attacks on the jurisdiction conferred by the Order for Relief did not cease until over seven years into the case when the Supreme Court denied cert. The initial meeting of creditors was held up for years because of Legg's breach of agreements and then

violations of Court orders directing him to file the required schedules, statement of affairs and list of creditors for UMI (Legg is the sole stockholder, officer and director of UMI). Legg refused to account for the money he took out of UMI (which was subsequently addressed in Adversary Proceeding No. 85-0375 and in Adversary Proceeding No. 87-0866 by Trustee). When judgment against Legg for the misappropriation of UMI's money and for constructive trust upon his highrise condominium in Adversary Proceeding No. 85-0375 was entered in excess of $400,000.00, he appealed every aspect thereof.

When ordered to provide documentary proof of the unsubstantiated claims of UMI against Trustee and the bankruptcy petitioning creditors, filed by him twice in the federal court system and twice dismissed, he refused. Faced with the choice of abandonment of these claims (which would go to UMI and thereby Legg) or prosecution, Trustee commenced Adversary Proceeding No. 87-0866 against Obaid, OBALCO and OTS. Trustee was satisfied with the validity of those claims asserted by those creditors - there was no viable documentation presented to the contrary, only the unsubstantiated, wild allegations of Legg. Trustee commenced that adversary against Obaid, OBALCO and OTS to preserve whatever defenses or objections might be subsequently documented by Legg, if at all, as he had been ordered to do. Legg was also sued by Trustee in that adversary proceeding for a further accounting of funds taken from UMI (although that was ordered of Legg in Adversary Proceeding No. 85-0375 as well).

The monetary sanctions in question arose from three separate proceedings or actions:

(1) Adversary Proceeding No. 85-0932. An Order was entered dated February 14, 1989 by the Bankruptcy Court against Legg for sanctions in favor of (a) Aegis Corporation for $6,288.75; (b) Trustee for $4,534.00; and (c) Obaid, Taher Obaid, Khalil Awad, OBALCO, Bassim Farouki, Dynasystems Corporation and C.D. (Jack) Gilkey for $52,870.31. The award order was affirmed on appeal by both the District Court and the Fifth Circuit Court.

(2) Adversary Proceeding No. 90-2548. In its Order of May 8, 1991, the Fifth Circuit Court determined:

> The appeal [of the District Court's denial of his Fed.R.Civ.P. 60(b) Motion] is frivolous.
>
> . . . Legg is ordered to pay each appellee as damages the reasonable attorney's fees expended in briefing this appeal and all costs duly taxed. If the parties are unable to agree on the amount of such fees, the district court is directed to fix the same.

Agreement was not reached. The District Court, by its Order entered December 6, 1991, ordered Legg to pay Trustee $5,009.00.

(3) Adversary Proceeding No. 87-0866. On March 30, 1989, the Bankruptcy Court ordered Legg to pay to Trustee, within fourteen days, $400.00 in costs.

It is significant that on still another, earlier occasion, Legg was warned of the potential for sanctions. By Per Curium Opinion dated December 2, 1988 in Cause No. 88-2721, the Fifth Circuit Court observed:

> Legg's arguments supporting his belated appeal to the district court are so obviously without merit that we must warn him of the possibility that sanctions may be incurred if he pursues the filing of further frivolous pleadings or appeals in this court.

None of the sanctions have been paid.

Before the District Court in Civil Action No. H-92-2141, in addition to the various sanctions orders, were the two adversary proceedings, or what remained of the two adversary proceedings, withdrawn from the Bankruptcy Court. Adversary Proceeding No. 85-0375 was the proceeding commenced by Trustee against Legg to recover $300,000.00 Legg had transferred from UMI to purchase a highrise condominium. The Bankruptcy Court found that Legg had breached his fiduciary duty by converting UMI's assets when UMI was insolvent, with the actual intent to hinder, delay and defraud UMI's creditors. Judgment was rendered against Legg for more than $300,000.00. A constructive trust was imposed on the highrise condominium in favor of the estate and Legg

was ordered to turn over the condominium to the Trustee. Also, Legg was ordered to provide an accounting to Trustee for all of UMI's funds used by him. These various orders were appealed by Legg, but affirmed by the District and Circuit Courts.

In Adversary Proceeding No. 87-0866, Trustee sought recovery from Legg of additional fraudulent transfers. It is in this adversary proceeding that Trustee also brought suit against Obaid, OBALCO and OTS to preserve whatever cause alleged by Legg as a defense to the claims asserted against the estate might be documented. Legg counterclaimed against Trustee for damages because of the invalidity of the Order for Relief and resulting trustee appointment order. Legg also asserted cross-claims against Obaid, OBALCO and OTS claiming, among others, breach of a 1983 contract between OBALCO and UMI, tortious interference, emotional distress, bad faith and the like.

Various motions were filed by Trustee and Legg in Civil Action No. H-92-2141. These included the Trustee's Motion for Protective Order, wherein Trustee re-urged his long pending Motion to Dismiss the counterclaim of Legg against him and the long pending Motion to Strike, Dismiss and for Sanctions filed by Obaid, OBALCO and OTS, to both of which Legg had filed no answer. [The counterclaim of Legg against Trustee is premised entirely upon Legg's allegation that the Order for Relief and the Consent to Entry of Order for Relief and Appointment of Trustee are void. Based upon that alleged voidness, Legg demands of the Trustee an accounting and return of all assets "wrongfully appropriated" by Trustee and

for damages of $5,750,000.00.] Also, there was pending the Trustee's Motion for Enforcement of Court Orders and the Trustee's Supplement thereto. There were a number of other motions pending by both Legg and Trustee. The most telling by Legg was his Motion for Leave to File First Amended Answer, Counterclaim and Cross-Claim. Opposition was interposed because it sought to expand the counterclaim against non-parties, W. Steve Smith, in his personal as opposed to trustee capacity, and Trustee's counsel, neither of which were parties to the adversary proceeding, because totally new grounds were being asserted on which limitations had run and because Legg had no standing to pursue such causes.

All motions were set for hearing on June 25, 1993. The Motion for Enforcement of Court Orders was granted. Legg's Motion to Recuse Trustee was denied. Legg's pleadings were stricken for failure to pay the sanctions assessed against him. Legg was given until August 2, 1993 "to pay all sanctions previously imposed against him or to satisfy the Court that he has no ability to pay. If Mr. Legg fails to comply with this Order, he will be held in civil contempt."

Legg failed to pay and failed to satisfy the Court that he had no ability to pay the sanctions by August 2, 1993. Rather, he filed a self-serving Affidavit on August 2, 1993 (not explaining its lateness or even seeking a hearing to attempt to satisfy the Court) and he filed a Notice of Appeal of the Court's Order on August 2, 1993. Trustee moved for entry of an Order of Civil Contempt on the grounds that the sanctions had not been paid and that Legg had failed to establish his inability to pay. The Affidavit that was submitted on

August 2, 1993 failed to meet any standards which would aid the Court in determining his indigence. Hearing was held on August 30, 1993. His counsel, but not Legg appeared. Hearing was set on the contempt motion for September 10, 1992. All parties were ordered to be present. Legg filed a Petition for Writ of Mandamus with the Fifth Circuit Court of Appeals seeking to recuse the District Court Judge from ruling on further matters. That Petition was denied by the Fifth Circuit on September 9, 1993. On September 10, 1993, the date of the hearing, Legg filed an Emergency Application for Stay with the United States Supreme Court until the denial of writ of mandamus by the Fifth Circuit could be reviewed by the United States Supreme Court. Legg failed to attend the contempt hearing as ordered. The Court entered an Order of Civil Contempt based upon Legg's failure to abide by the first Order, to pay the sanctions or to satisfy the Court that he had no ability to pay, by August 2, 1993, and upon the Court's second order to personally appear at the hearing on September 10, 1993, and an Order remanding Legg to the custody of the United States Marshal. A bench warrant for his arrest was issued. Efforts to enforce that Order by the Marshals have been unsuccessful.

RESPONSE TO REASONS ASSERTED BY PETITIONER FOR GRANTING THE WRIT

1. *Death Penalty Sanctions against a Bankruptcy Litigant*

Legg misrepresents Trustee's letter to the Fifth Circuit court requesting reconsideration of its decision not to publish its affirmance of the sanctions order. A true and correct copy

is incorporated as Appendix A. Even if these misstatements were taken as true, there would still be the requirement under Legg's presentation that he has established his financial impairment. He was given the opportunity to establish that and refused to do so. To the extent that Legg attempts to make headway out of the Article 1 versus Article 3 court distinction, it was the Fifth Circuit Court and District Courts which either ordered and set the sanctions or upheld the sanction awards upon appeal, and it was the District Court which granted Trustee's motion to enforce those sanctions.

1. *Non-Payment of Monetary Sanctions*

The cases cited by Legg in support of this reason for granting the writ are Rule 11 cases. Even so, the case cited by him of *In re Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986), states that the:

> primary purpose of sanctions is . . to deter subsequent abuses. This policy is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions.

The imposition of the monetary sanctions in the earlier proceedings have had absolutely no deterrent effect - in Adversary Proceeding No. 87-0866, Legg was and remained a most active participant before the Bankruptcy and District

courts for over three years after entry of the sanctions order; in C.A. H-88-1958, the sanctions order was the result of unfettered access to the courts. The sanctions order became final because no further appeal was taken by Legg and the case became moot (in all respects other that the sanctions order); in Adversary Proceeding No. 85-0932, Legg was allowed total access to the District Court and the Fifth Circuit Court to appeal the sanction order, and both Courts affirmed. Each of the courts involved in imposing the sanctions orders accorded Legg all due process - hearings were held, Legg was free to and did participate, evidence was taken on the particular damage (fees sustained) of each case and Legg either appealed and lost or allowed the order to become final. Before being held in contempt, Legg was given the opportunity to show an inability to pay the sanctions, but he refused.

These matters were concluded. Yet, even at the end of the matter, Legg did not pay the ordered sanctions. Legg continued in pursuing causes which did not belong to him and in abusing the bankruptcy system.

The Court has the right to structure the sanctions necessary or warranted to control its docket, to maintain the orderly administration of justice or to enforce its orders. *Vinson v. Heckman*, 940 F.2d 114 (5th Cir. 1991). The striking of the pleadings is about the only structured penalty to fit the flagrant actions of Legg over the past nine year ordeal of this case. Further, when you consider the pleadings which were struck, there has been absolutely no harm. On its face, the claim asserted against the Trustee was based solely upon the invalidity of certain orders. Those certain orders have been

upheld all the way to the U.S. Supreme Court. Even Legg acknowledged this fact by his effort to obtain an eleventh hour leave to amend his pleadings. Further, on their face, the claims asserted against Obaid, OBALCO and OTS are corporate causes and belong to the Trustee. His efforts to "personalize" the allegations by way of his Motion for Leave to Amend do not change the true nature of the underlying causes which belong to the Trustee (assuming such causes exist or are valid). In any event, Legg was unable to persuade the District Court to grant leave to amend his pleadings. The pleadings struck, therefore, would have gained Legg nothing.

Finally, Legg was accorded even one more safety net. He was given a thirty day period to pay the sanctions or prove an inability to pay. This he rejected as well. In fact, at no time has Legg attempted to establish any inability to pay. Quite the contrary, most of the time spent by him during this bankruptcy case has been out of the country for his international clients, as the history of motions for continuances establish.

Legg demands that his access to the courts be continual notwithstanding the costs to other parties in interest and the importance that the directives and the orders of the courts be followed. However, there are many other parties, in addition to Legg, legitimate parties whose rights have been and are affected by this bankruptcy and Legg's delays, who must be considered. The system has bent over backwards to be fair to Legg. He has not reciprocated. He has cost the administration dearly by expense and delay. He has not paid sanctions ordered. He has not paid the judgment against him, now over $400,000 in amount.

3. *Rule 12(b)(6)*

Trustee does not concede that the court relied upon Rule 12(b)(6) in any form or fashion. However, for the sake of argument, the pleadings of Legg against Trustee were based solely upon a challenge to the validity of the Order for Relief and the Order appointing Trustee. As before stated, these Orders were challenged on many occasions and upheld at each and every instance and on appeal. Legg even acknowledged this in his Motion seeking leave to replead.

In response to the concession Legg attributes to Trustee, Trustee did concede that the important books and records were not recovered by him, but it was Trustee's belief that the same were taken by Legg; Trustee did acknowledge that he had been informed by Legg that they had been taken and had been seen in the Virginia offices of OBALCO, however, the "affidavit" relied upon by Legg in establishing this fact did not say what Legg said it said; further, Trustee did rely upon statements of third parties who saw Legg leaving the UMI premises on or about the day of the involuntary petition, with records of UMI; and Trustee has done everything that he can to secure recovery of the books.

4. *Rule 41(b) and Inherent Power*

The argument under Rule 41(b) presupposes an inability to pay monetary sanctions. As stated before, there has been no finding to that effect, although Legg was afforded several opportunities to attempt to establish that fact. All were rejected by him.

The federal courts have the power to dismiss a cause or strike a pleading with prejudice for failure to prosecute or to comply with court orders. This authority is inherent; this authority is also pursuant to Fed.R.Civ.P. 41(b), (c). *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed 2d 734 (1962); *Pond v. Braniff Airways, Incorporated*, 453 F.2d 347 (5th Cir. 1972).

A federal district court has the power to control its docket, including the power to dismiss a case or a counterclaim and cross claim as a sanction for failure to obey orders. *Natural Gas Pipeline Co. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1406-07 (5th Cir. 1993), cert den'd sub nom., *Fox v. Natural Gas Pipeline*, _____ U.S. _____, 114 S.Ct. 882, 127 L.Ed 2d 77 (1994). That dismissal should be upheld unless there can be shown an abuse of discretion. *Frame v. S-H, Inc.*, 967 F.2d 194, 202 (5th Cir. 1992).

Sight should not be lost of the fact that the sanctions imposed upon Legg started at a much lesser drastic state. In Adversary Proceeding No. 85-0932, Legg was warned that sanctions might be imposed, but it was not until February of 1989 that sanctions were finally awarded for continued abuse. Before the first monetary sanction award, the Fifth Circuit, by its Opinion dated December 2, 1988, warned Legg of the possibility that sanctions might be incurred if he persisted in his actions. The next drastic sanction alternative was required - the actual imposition of monetary sanctions. This lead to no out of pocket penalty and Legg continued to abuse the system and the procedures. Legg caused the Court to go to the next level of severity, the striking of pleadings and contempt. Still,

safeguards were provided Legg and he failed to utilize these safeguards.

CONCLUSION

Petitioner has failed to show the requisite special and important reasons for granting same. The petition for writ of certiorari should be denied.

W. STEVE SMITH
Counsel of Record
for Respondent
910 Louisiana, Ste. 400
Houston, Texas 77002

(713) 227-2525

APPENDIX "A"

BONHAM, CARRINGTON & FLOYD, P.C.
ATTORNEYS AT LAW
910 LOUISIANA, SUITE 400
HOUSTON, TEXAS 77002-4906

W. STEVE SMITH
BOARD CERTIFIED
BUSINESS BANKRUPTCY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
AND
AMERICAN BANKRUPTCY BOARD OF CERTIFICATION
DIRECT LINE 227-3935

(713) 227-2525
FAX (713) 227-0701

May 23, 1994

Mr. Charles R. Fulbruge, III, Clerk
United States Court of Appeals for
the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: No. 93-2613; In the Matter of United Markets International, Inc., W. Steve Smith, Trustee vs. R. David Legg

Dear Mr. Fulbruge:

I am the Trustee of the Bankruptcy estate of United Markets International, Inc. and was the Appellee in the

captioned case. The Panel deciding that case consisted of Circuit Judges Garwood, Smith and DeMoss. The Panel decided not to publish their Opinion. My letter today is to request of the Panel reconsideration of that decision. I believe that the Opinion "concerns or discusses a factual or legal issue of significant public interest", or "calls attention to an existing rule of law that appears to have been generally overlooked" or "applies an established rule of law to facts significantly different from those in previous published opinions applying the rule". L.R. 47.5.1.

I have served as a trustee since 1975. In that period of time I have faced countless debtors or principals of debtors who, for whatever reason, have decided that the rules of bankruptcy do not apply to them and that any and all efforts by the trustee to recover property of the estate or to enforce rules and regulations upon them will be met with a scorched earth campaign. That scorched earth campaign puts the trustee in the unenviable position of declining to pursue his fiduciary duty or facing criticism when he attempts to recover his costs for his efforts. In my years of trustee practice there are probably a hundred cases, in addition to this case, where this has been true. Some of the more celebrated cases are R. E. Allender (beginning in 1982), Shearn Moody (1986), P. T. Eichelberger, Jr. (1989), Suzanne Frame (1990), and Nicholas Bachynsky (1989). Multiply my experiences by the 1500

trustees around the country and you can imagine the costs to the bankruptcy system.

In preparing my motion to Judge Black for enforcement of the sanctions and in briefing the appeal to this Court, I could find no decisions that addressed head-on the type of bankruptcy abuses faced by this Court in this case. I was, therefore, forced to analogize to the prisoner cases and some of the other civil litigation type abuse cases. The publication of this Opinion would give the trustees another weapon for their arsenal and would put the litigious debtors and principals of debtors on notice that abuse of the system will not be tolerated.

I therefore request that the Panel reconsider its decision and allow this Opinion to be published.

Sincerely,

BONHAM, CARRINGTON & FLOYD, P.C.

By: _____
W. Steve Smith

WSS/WSSUMI.C76/jaf

cc: Hon. Norman W. Black
Hon. R. F. Wheless, Jr.